Jalaludeen a/l Abdul Aziz v Thrumalingam a/l S Rajadurai & Anor

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12–39 OF 1998
MOHD HISHAMUDIN J
19 NOVEMBER 1998

Contract *— Illegality — Consideration — Failure to obtain approval of state authority — Part of purchase price paid under contract — Whether object or consideration of contract forbidden by law, and thus void — Whether vendor must restore money to purchaser — Contracts Act 1950 ss 24 & 66 — National Land Code 1965 ss 433B(1)(b) & 433C*

Land Law *— Sale of land — Foreign purchaser — Failure to obtain approval of state authority — Part of purchase price paid under contract — Whether object or consideration of contract forbidden by law, and thus void — Whether vendor must restore money to purchaser — National Land Code 1965 ss 433B(1)(b) & 433C — Contracts Act 1950 ss 24 & 66*

The plaintiff, who was a permanent resident of Malaysia, entered into a sale and purchase agreement with the defendants, who were the registered owners of a bungalow that the plaintiff wished to purchase. In accordance with the terms of the contract, the plaintiff paid a deposit of RM27,000. The balance was to be paid in three months. As the full payment was to be effected by way of a bank loan, the plaintiff, at a later date, paid the defendants another RM20,000 as the difference between the purchase price and the loan the plaintiff would be obtaining. However, as s 433B(1)(b) of the National Land Code 1965 ('the NLC') restricts the ownership of land by non-citizens, the plaintiff was required to obtain the prior approval of the state authority, although the sale and purchase agreement did not mention anything about the status of the plaintiff. The plaintiff was not successful in getting the required approval, and yet the defendants' solicitors demanded that the plaintiff pay the balance of the purchase price or risk having the sum he had already paid forfeited. The plaintiff's solicitors then wrote to the defendants' solicitors informing them that the memorandum of transfer, as well as the sale and purchase agreement, were null and void by reason of s 433B(1)(b) of the NLC and that the defendants were not entitled to forfeit the money paid. The plaintiff's solicitors requested the return of the sum but the defendants refused to do as bidden. The plaintiff filed his summons and statement of claim. The plaintiff, at the sessions court, claimed for the return of the sum of money from the defendants as a refund owing to a void contract. The plaintiff applied for summary judgment against the defendants pursuant to s 26A of the Subordinate Courts Rules 1980 ('the SCR') but this application was dismissed by the sessions court judge. The plaintiff appealed against this decision.

Held, allowing the appeal with costs; ordering the sum of RM47,000 to be returned by the defendants to the plaintiff:

(1) If a dealing had taken place — and the court had held that it had — it followed then that, in the instant case, by reason of s 433B(1)(b) of the NLC, the execution of the memorandum of transfer should have been done with the *prior* approval of the state authority (see p 243G–H). Since no prior approval of the state authority had been obtained by the plaintiff in respect of the transaction, therefore, such dealing was in contravention of s 433B(1)(b) of the NLC. And since the dealing was in contravention of s 433B(1)(b) of the NLC, it was null and void by reason of s 433C of the same (see p 243H).

(2) The sale and purchase agreement, in not disclosing that the purchaser was a non citizen, and in requiring the parties to execute the memorandum of transfer — but without providing for the requirement of the prior approval of the state authority as stipulated by s 433B(1)(b) of the NLC — contained an object or consideration that was forbidden by law, ie forbidden by ss 433B and 433C of the NLC. Hence, the object or consideration was unlawful and the agreement was, therefore, void by reason of s 24 of the Contracts Act 1950 (see p 244B–C). Therefore, the agreement was void, and by reason of s 66 of the Contracts Act 1950, the defendants to whom the amount of RM47,000 was paid by the plaintiff were persons who had received advantage under a void agreement. Thus, they were under an obligation to restore the money to the plaintiff (see p 244E–F).

[Bahasa Malaysia summary

Plaintif, seorang pemastautin tetap Malaysia, menandatangani suatu perjanjian jualbeli dengan defendan-defendan yang merupakan pemilik berdaftar sebuah rumah banglo yang ingin dibeli oleh plaintif. Sebagaimana yang ditetapkan dalam terma-terma perjanjian tersebut, plaintif membayar cagaran sebanyak RM27,000. Baki jumlah tersebut akan dibayar dalam masa tiga bulan. Oleh kerana bayaran penuh akan dilaksanakan melalui pinjaman bank, plaintif, pada satu hari yang lain, membayar defendan-defendan RM20,000 lagi sebagai perbezaan di antara harga belian dan pinjaman yang bakal diterima plaintif. Walau bagaimanapun, oleh kerana s 433B(1)(b) Kanun Tanah Negara 1965 ('KTN') menghadkan pemilikan tanah oleh mereka yang bukan warganegara Malaysia, plaintif diwajibkan mendapatkan kelulusan terlebih dahulu daripada pihak berkuasa negeri, walaupun perjanjian jualbeli tersebut tidak menyatakan apa-apa mengenai status plaintif. Plaintif tidak berjaya mendapatkan kelulusan yang diperlukan, tetapi peguam defendan-defendan tetap menuntut bayaran baki harga belian daripada plaintif, jika tidak, plaintif menanggung risiko jumlah yang telah dibayarnya itu dilucuthak. Peguam plaintif kemudiannya

menulis surat kepada peguam defendan-defendan dan memberitahu mereka bahawa memorandum pindahmilik serta perjanjian jualbeli tersebut batal dan tidak sah menurut s 433B(1)(b) KTN dan bahawa defendan-defendan tidak berhak melucuthak wang yang telah dibayar. Peguam plaintif menuntut pemulangan wang yang telah dibayar tetapi defendan-defendan enggan berbuat demikian. Plaintif memfailkan saman dan pernyataan tuntutannya. Plaintif, di mahkamah sesyen, menuntut pemulangan wang daripada defendan-defendan sebagai pemulangan yang diakibatkan kontrak yang batal. Plaintif memohon untuk mendapatkan penghakiman ringkas terhadap defendan-defendan berdasarkan s 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') tetapi permohonan ini telah ditolak oleh hakim mahkamah sesyen. Plaintif merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan tersebut dengan kos; memberi perintah agar jumlah RM47,000 tersebut dipulangkan oleh defendan-defendan kepada plaintif:

(1) Sekiranya urusan tersebut telah dilaksanakan — dan mahkamah memutuskan bahawa ia memang telahpun dilaksanakan — ia jelas bahawa dalam kes ini, disebabkan s 433B(1)(b) KTN, pelaksanaan memorandum pindahmilik tersebut sepatutnya dilakukan dengan kelulusan pihak berkuasa negeri *terlebih dahulu* (lihat ms 243G–H). Oleh kerana tiada kelulusan telah diberikan terlebih dahulu oleh pihak berkuasa negeri kepada plaintif bagi transaksi tersebut, urusan sedemikian telah melanggar s 433B(1)(b) KTN. Oleh kerana urusan tersebut melanggar s 433B(1)(b) KTN, ia batal dan tidak sah disebabkan s 433C kanun yang sama (lihat ms 243H).

(2) Perjanjian jualbeli tersebut, kerana tidak mendedahkan maklumat bahawa pembeli tersebut bukan warganegara Malaysia, dan kerana mewajibkan pihak-pihak melaksanakan satu memorandum pindahmilik — tetapi tanpa menyatakan keperluan bahawa kelulusan perlu diperolehi daripada pihak berkuasa negeri terlebih dahulu seperti yang distipulasikan oleh s 433(1)(b) KTN — mengandungi satu objek atau balasan yang dihalang oleh undang-undang, yakni, ss 433B dan 433C KTN. Oleh itu, objek atau balasan tersebut adalah salah di sisi undang-undang dan perjanjian tersebut adalah tidak sah disebabkan s 24 Akta Kontrak 1950 (lihat ms 244B–C). Oleh itu, perjanjian tersebut tidak sah, dan menurut s 66 Akta Kontrak 1950, defendan-defendan, yang telah dibayar jumlah RM47,000 oleh plaintif, merupakan pihak yang telah menerima suatu kelebihan di bawah satu perjanjian yang tidak sah. Mereka kini mempunyai kewajipan memulangkan wang tersebut kepada plaintif (lihat ms 244E–F).]

Notes

For cases on illegal consideration, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) pras 3075–3078.

Legislation referred to

Contracts Act 1950 ss 24, 66
National Land Code 1965 ss 5, 206, 207, 208, 209, 210, 211, 212, 433B(1)(b), 433C, Form 14A
Subordinate Courts Rules 1980 s 26A

Appeal from: Civil Suit No 52–473 of 1997 (Sessions Court, Alor Setar)

Vazeer Alam (*Vazeer Akbar Majid & Co*) for the appellant.
Nadarajan Arumugam (*Nadarajan & Co*) for the respondents.

Mohd Hishamudin J: This is an appeal by the appellant/plaintiff against the decision of the learned Sessions Court Judge Alor Setar of 5 May 1998 dismissing the plaintiff's application for summary judgment against the defendants/respondents pursuant to s 26A of the Subordinate Courts Rules 1980 ('the SCR').

The claim by the plaintiff before the lower court was for the return of a sum of money amounting to RM47,000 from the defendants. The plaintiff claimed that he was entitled to the refund by reason of a void contract entered into between him and the defendants relating to the sale of a double storey bungalow house.

The plaintiff is a non-citizen but is a permanent resident of Malaysia. The defendants were the registered owners of a double storey bungalow house situated in Lorong Kelumpang, Bakar Bata, Alor Setar. They were desirous in selling the house, and the plaintiff was interested in buying. So on 20 November 1994, the plaintiff entered into a sale and purchase agreement with the defendants. Upon signing the agreement and in accordance with the terms of the contract the plaintiff paid a deposit of RM27,000. The balance of RM243,000 was to be paid in three months' time. As the full payment was to be effected by way of a bank loan, the plaintiff subsequently at a later date paid the defendants another RM20,000, this sum being the difference between the purchase price and the amount of loan the plaintiff would be getting from a financial institution. All in all the plaintiff has paid the defendants RM47,000.

The National Land Code 1965 ('the NLC') restricts the ownership of land by non-citizens. The buyer/plaintiff, being a non-citizen, was required by s 433B of the NLC to obtain the prior approval of the state authority of Kedah before the defendants could transfer the property to him.

It is to be observed, however, that the aforesaid sale and purchase agreement did not mention anything about the status of the plaintiff (being a non-citizen) or the statutory requirement to obtain the prior approval of the state authority under the said s 433B of the NLC. On the contrary, the

A agreement requires the parties to the agreement to execute the memorandum of transfer contemporaneously upon the execution of the sale and purchase agreement. Clause 3.01 of the agreement stipulates:

> Execution and delivery of transfer documents
>
> The vendors shall upon execution of this agreement execute or cause to be
B executed a valid and registrable memorandum of transfer in respect of the said property in favour of the purchaser and/or his nominee and shall deposit the same together with the relevant stamp proforma with the purchaser's solicitors subject to the purchaser's solicitors' undertaking to submit as soon as practicable the same to the stamp office for the purpose of adjudication of the ad valorem stamp duty pay able thereon and not for any other purpose.

C And in compliance with the above clause, the memorandum of transfer (the transfer form — Form 14A of the NLC) was duly executed by the parties on the same day the agreement was executed.

Accordingly, by a letter dated 16 March 1995, the plaintiff's solicitor wrote to the State Director of Land and Mines, Kedah, for an approval to
D transfer the land (ie the house) to the defendants. Paragraphs 4 and 5 of the letter of 16 March 1995 read:

> (4) En Jalaludeen a/l Abdul Aziz adalah seorang pemastautin tetap di Malaysia selama 40 tahun. Beliau menjalankan perniagaan di Malaysia dan kesemua ahli keluarganya ada bersama beliau. Beliau ingin membeli
E hartanah tersebut untuk kegunaan kediaman beliau dan keluarganya.
>
> (5) Berdasarkan fakta-fakta di atas kami bagi pihak En Jalaludeen a/l Abdul Aziz dengan rendah diri memohon kebenaran dari pihak tuan mengikut kehendak Kanun Tanah Negara untuk menerima pindahmilik tersebut.

He was not successful in getting the approval. Paragraph 2 of the letter of
F the State Director of Land and Mines of 19 September 1995 states:

> Inilah dimaklumkan Pentadbiran ini belum lagi dapat menimbangkan permohonan tuan seperti tersebut di atas kerana dasar pemilikan tanah oleh warganegara/syarikat asing masih lagi dalam kajian Pentadbiran ini dan belum lagi diwartakan dalam Aturan Tanah Negeri Kedah Darul Aman.

G Meanwhile by a letter dated 3 August 1995, the defendants' solicitors wrote to the plaintiff asking payment of the balance of the purchase price and that should the plaintiff fail to make the payment the defendants would terminate the agreement and forfeit the amount of RM47,000 already paid by the plaintiff.

H In response, the plaintiff's solicitors wrote to the defendants' solicitors informing them that the memorandum of transfer as well as the sale and purchase agreement were null and void by reason of s 433C of the NLC and that the defendants were not entitled to forfeit the amount already paid to them. The plaintiff's solicitors requested for the return of the amount of RM47,000 paid to the defendants, but the defendants refused to do so.
I Hence the suit by the plaintiff.

The plaintiff's summons and statement of claim were filed on 2 September 1997.

The defendants' statement of defence and counter claim were filed on 24 February 1998.

The plaintifs reply and defence to counter claim was filed on 15 March 1998.

The plaintiff's application for summary judgment pursuant to O 26A of the SCR was filed on 6 April 1998.

The appellant's counsel, Encik Vazeer Alam, in arguing that there is no triable issue, submitted that the agreement as well as the Form 14A was null and void by reason of s 24 of the Contracts Act 1950 ('the Act') and ss 433B and 433C of the NLC. As such the plaintiff was entitled to a refund of the amount of RM47,000 pursuant to s 66 of the Act.

Section 433C of the NLC states:

> Disposal, dealing, etc in favour of a non-citizen and foreign company in contravention of s 433B to be null and void.
>
> After the commencement of this Part, any disposal of land by the State Authority, or any dealing or other act with regard to alienated land or any interest therein, in contravention of s 433B shall be null and void.

Section 433B of the NLC stipulates:

> Non-citizens and foreign companies may acquire, etc land only with approval of State Authority.
>
> (1) Notwithstanding anything contained in this Act or in any other written law —
>
> (a) ...
>
> (b) a dealing under Division IV with respect to alienated land or an interest in alienated land may be effected in favour of a non-citizen or a foreign company;
>
> ...
>
> ...
>
> but only after the prior approval of the State Authority has been obtained upon an application in writing to the State Authority by such non-citizen or foreign company.

Section 5 of the NLC defines dealing as:

> 'dealing' means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;

There was no dispute that a sale and purchase agreement had been entered into by the parties and that the plaintiff had paid the defendants a sum of RM47,000 as part payment towards the purchase of the house. It was also not disputed that the plaintiff was a non-citizen and that by reason of s 433B(1)(b) of the NLC prior approval of the state authority was required before the house could be transferred by the plaintiff to the defendants. It was also not disputed that the memorandum of transfer had been executed by the parties and that the prior approval of the state authority was never

obtained at the time of the signing of the agreement or the execution of the memorandum of transfer or thereafter. However, the learned counsel for the defendants, Mr Nadarajan, in arguing that there was a triable issue submitted that merely to execute a memorandum of transfer (Form 14A) does not amount to 'dealing'. Learned counsel argued that a 'dealing' takes place only when the memorandum of transfer is presented to the land office for registration. He further contended that s 433B of the NLC does not apply to the mere making of a sale and purchase agreement: it only applies to dealings.

I agree that s 433B(1)(b) of the NLC applies only to 'dealings' and does not apply to a sale and purchase agreement. However, with respect, I disagree with the suggestion that a dealing takes place only *after* a memorandum of transfer has been presented to the land office for registration. In my judgment, basing on the definition of 'dealing' as provided for by s 5 of the NLC and after a careful consideration of the scheme of the provisions of Division IV of the NLC, which deals with 'dealings' involving alienated lands, the mere execution of the memorandum of transfer by the transferor and the transferee, meaning that all the parties to the transaction having duly completed and signed the transfer form and their respective signatures duly attested, such a transaction by itself, is a 'dealing': it is, to borrow the wordings used in the definition of 'dealing', a 'transaction with respect to alienated land effected under the powers conferred by Division IV' It is immaterial that the duly executed form has not yet been presented to the land office for registration. I am fortified in my view, particularly, by ss 206–212 and the title of Part Eighteen of the NLC which reads:

PART EIGHTEEN
REGISTRATION OF DEALINGS

This heading implies that 'dealing' and 'registration' are two different aspects of the transfer process, the latter complementing the former. In other words, the act of registration, although mandatory in order to complete the process of transferring the property, it is, nevertheless, extraneous to, and not an element of, 'dealing'. One does not 'register' a 'dealing' if the concept of dealing already incorporates the act of registration.

If a dealing had taken place — and I hold that it had — it follows then that, in the instant case, by reason of s 433B(1)(b) of the NLC, the execution of the memorandum of transfer should have been done with the *prior* approval of the state authority.

Now, since no prior approval of the state authority had been obtained by the plaintiff in respect of the transaction, therefore, such dealing was in contravention of s 433B(1)(b) of the NLC. And since the dealing was in contravention of s 433B(1)(b) of the NLC, it was null and void by reason of s 433C of the same.

What about the legal status of the sale and purchase agreement between the parties? Section 24 of the Act provides that:

> What considerations and objects are lawful, and what not.
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by law;
>
> ...
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

In my judgment, the sale and purchase agreement, in not disclosing that the purchaser was a non-citizen, and in requiring the parties to execute the memorandum of transfer — but without providing for the requirement of the prior approval of the state authority as stipulated by s 433B(1)(b) of the NLC — contains an object or consideration that is forbidden by law, that is to say, forbidden by ss 433B and 433C of the NLC. Hence, the object or consideration was unlawful and the agreement was, therefore, void by reason of the above s 24 of the Act.

Further, as I have hold that the agreement was void, it is also my judgment that by reason of s 66 of the Act the defendants were under an obligation to return the RM47,000 to the plaintiff. The provision reads:

> Obligation of person who has received advantage under void agreement, or contract becomes void
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In the present case, the defendants to whom the amount of RM47,000 was paid by the plaintiff were persons who had received advantage under a void agreement. Thus, they were under an obligation to restore the money to the plaintiff.

Based on the above reasons, I find that the defendants have no defence to the plaintiff's claim. Accordingly, I have allowed the plaintiff's appeal with costs and I ordered the defendants to return the amount of RM47,000 to the plaintiff.

Appeal allowed with costs; the sum of RM47,000 to be returned by the defendants to the plaintiff.

Reported by Wong Ee Lynn